No. 86-804

In the Supreme Court of the United States

OCTOBER TERM, 1986

IN RE:
ROWAN COMPANIES, INC.,

Petitioner

AND
ROWAN COMPANIES, INC.

Petitioner

VERSUS
LOUIS W. STOREY

Respondent

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF LOUISIANA, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND PETITION FOR STATUTORY AND COMMON LAW WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
PETITION 1
RESPONSE TO PETITION FOR WRITS OF MANDAMUS AND CERTIORARI 1
REASONS FOR DENYING PETITIONER WRITS ... 1

A. The historical development of admiralty jurisdiction clearly shows that there is no right to a jury trial in maritime cases 2

B. The jury trial right guaranteed by the seventh amendment to the United States Constitution is inapplicable to admiralty cases 3

C. Petitioner has no statutory right to a jury trial herein 5

D. The sole limitation to the withdrawal of a rule 9(h) identifying statement are those contained in F.R.C.P. rule 15 6

E. The original complaint herein specifically does not allege jurisdiction based on diversity of citizenship 8

F. The federal rules of civil procedure do not deny petitioner due process and equal protection of the laws 9

CONCLUSION 10
CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

CASES:

SUPREME COURT:

Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 58 S.Ct. 651 (1938) 7

Illinois v. City of Milwaukee, 92 S.Ct. 1385, 406 U.S. 91 (1972) 5

Joy v. City of St. Louis, 201 U.S. 332,26 S.Ct. 478 (1906) 8

Romero v. International Terminal Operating Co., 79 S.Ct. 468,358 U.S. 354 (1959) 4, 6

CIRCUIT COURT:

Doucet v. Wheless Drilling Co., 467 F.2d 336 (C.A. 5th Cir. 1975) 7

Johnson v. Penrod Drilling Co., 469 F.2d 897 (C.A. 5th Cir. 1975) 8

Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, pp. 172-173 (C.A. 2d Cir. 1973) .. 2

Rachal v. Ingram Corp., 795 F.2d 1210 (C.A. 5th Cir. 1986) 2, 8

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. CONSTITUTION:

Article III 3

Seventh Amendment to the United States Constitution 3, 5

STATUES:

Federal Rule of Civil Procedure, Rule 2 4

Federal Rule of Civil Procedure, Rule 9(h) 5, 6, 7, 8, 10

Federal Rule of Civil Procedure, Rule 15 ..... 6, 7, 9

Federal Rule of Civil Procedure, Rule 38 ..... 5, 9, 10

Supplemental Admiralty Rules A-F 4

Judiciary Act of 1789, Sec. 9, 1 Stat. 76-77 3

28 USC 1331 4

46 USC 688 ..... 6, 8

TREATISES:

Gilmore and Black. *The Law of Admiralty; 2nd Ed.* The Foundation Press, Inc.; Mineola, N.Y., 1975 ..... 2, 4, 5

Norris. *The Law of Maritime Personal Injuries,* 3rd Ed. The Lawyers Co-Operative Publishing Co.; Rochester, N.Y., 1975 6

Wright & Miller. *Federal Practice and Procedure,* Vol. 5, sec. 1211, pp. 99-100 9

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RESPONSE TO PETITION FOR WRITS OF MANDAMUS AND CERTIORARI

NOW INTO COURT, through his undersigned counsel, comes and appears respondent, LOUIS W. STOREY, who respectfully responds to the petition for writs of mandamus and certiorari filed in this Honorable Court by petitioner, ROWAN COMPANIES, INC., as follows, to-wit:

1.

The Honorable Supreme Court of the United States has previously provided that there is no right to a jury trial in a maritime case. There is no statutory nor Constitutional right to a jury trial in a maritime case, nor is there any jurisprudential precedent for such an erroneous contention. For the following reasons, petitioner is due neither a writ of mandamus nor a writ of certiorari.

REASONS FOR DENYING PETITIONER WRITS

A. *THE HISTORICAL DEVELOPMENT OF ADMIRALTY JURISDICTION CLEARLY SHOWS THAT THERE IS NO RIGHT TO A JURY TRIAL IN MARITIME CASES:*

Respondent has previously advanced the argument that, like a stork hovering above a sorority house, the decision in *Rachal v. Ingram Corp.*, 795 F.2d 1210 (C.A. 5th Cir. 1986) was the bearer of bad news for petitioner, ROWAN COMPANIES, INC. Likewise, before this Honorable Court, that stork brings additional bad constitutional and statutory news of every applicable sort to petitioner's desperate attempt to obtain a trial by jury.

As Judge Anderson stated in *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, at pp. 172-173 (C.A. 2d Cir. 1973:

> "...the time has still not come when one is entitled to a jury trial in every admiralty suit."

In fact, only recently has a party had any opportunity for a jury trial in a maritime case in federal court.

The absence of any right to a trial by jury in admiralty claims can be traced back to the very development and nature of American admiralty law. Our use of the term "admiralty" comes from the judicial powers granted to the Lord High Admiralty in England, to hear cases of a maritime nature, dating back to 1377. Gilmore & Black. ***The Law of Admiralty; 2nd Ed.*** The Foundation Press, Inc.; Mineola, N.Y. (1975) p. 9. This practice of the Admiral adjudicating alone and without a jury was carried over into the British colonies in America through the establishment of separate Vice-Admiralty courts. ***Gilmore & Black***, p. 10.

At the time of the adoption of the United States Constitution, therefore, the United States had a long tradition of Admiralty courts being separate from the courts of common law, as well as adjudicating without a jury. In addition to the absence of jury trials, admiralty practice was distinguished from common law personal injury actions by its terminology. For example, until the adoption of the Federal Rules of Civil Procedure in 1966, one initiated his common law action by filing a complaint, while the admiralty case was brought by means of a libel. Clearly, although combined into the same federal courts, admiralty jurisdiction and procedure was as separate and distinct from a common law action as was the federal courts' equity powers.

B. *THE JURY TRIAL RIGHT GUARANTEED BY THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS INAPPLICABLE TO ADMIRALTY CASES:*

The Seventh Amendment to the United States Constitution, relied upon by petitioner in arguing that it has a Constitutional right to a jury trial below, begins with the phrase: ***"In suits at common law..."***. The Redactors of the Seventh Amendment were well aware that an admiralty case was not a "suit at common law." id. The distinct nature of admiralty and maritime claims can be seen by their specific mention in United States Constitution, Article III.

Another distinction between admiralty and common law civil actions is found in Sec. 9 of the Judiciary Act of 1789, where Congress granted federal district courts original jurisdiction over admiralty and maritime claims. 1 Stat. 76-77. Furthermore, that same statute, in its "saving to suitors" clause, evidences the distinction between maritime and common law actions by providing: "saving to suitors, in all cases, ***the right of a common law remedy, where the***

common law is competent to give it;... id. For the next 175 years, the admiralty jurisdiction of the federal courts was kept separate from those courts' common law jurisdictions; "the admiralty docket was a thing apart, and the admiralty suit was handled under an entirely separate set of procedural rules." ***Gilmore & Black.*** p. 19.

In 1949, Congress enacted 28 USC 1333, which, along with its companion statutes, granted original maritime jurisdiction to federal district courts. 28 USC 1333 is, essentially, the reenactment of sec. 9 of the Judiciary Act of 1789. In 28 USC 1333, Congress recognized admiralty and maritime as a separate and distinct basis for federal jurisdiction. Previously, in 1937, this Court adopted Federal Rules of Civil Procedure Rule 2, which combined the equity and law powers of the federal courts, while the Notes of the Advisory Committee clearly distinguishes equity and law from admiralty.

In 1959, this Supreme Court, in *Romero v. International Terminal Operating Co.*, 79 S.Ct. 468, 358 U.S. 354, rejected contentions that the law side of the federal courts had jurisdiction over maritime claims, with the right to jury trials, under the provisions of 28 USC 1331. By so holding, this Supreme Court recognized the distinction between an admiralty case and a federal question ("*...civil actions arising under the Constitution, laws or treaties of the United States*"). 28 USC 1331. Once again the distinction between admiralty and common law actions was made.

By order of this Supreme Court, in 1966, much of admiralty procedure was combined with the Federal Rules of Civil Procedure. Nevertheless, portions of distinct admiralty procedures were preserved. Supplemental Admiralty Rules A through F were adopted, and admiralty distinctions were carried over into Rules 14, 26, 38, 73 and 82.

Lastly, the distinction between admiralty and federal common law is noted as currently being: ***"except in the admiralty field,*** *there is federal question jurisdiction of claims based upon federal law."* Wright. ***Law of Federal Courts; 4th Ed.*** West Publishing Co.; St. Paul, Minn. (1983) p. 97, citing *Illinois v. City of Milwaukee*, 92 S.Ct. 1385, 406 U.S. 91 (1972).

It is clear, therefore, that the Constitutional, statutory, jurisprudential and historical distinctions made between admiralty and common law actions show that the Seventh Amendment guaranty of jury trials in suits at common law is inapplicable to admiralty and maritime cases. Petitioner, then, has no Constitutional right to a jury trial herein. See: *Gilmore & Black. p. 295.*

C. *PETITIONER HAS NO STATUTORY RIGHT TO A JURY TRIAL HEREIN:*

In addition to having no Constitutional right to a jury trial in this maritime case, petitioner, ROWAN COMPANIES, INC., also has no statutory right to a jury trial.

Petitioner relies upon the provisions of Federal Rules of Civil Procedure Rule 38 for its statutory right to a Seventh Amendment right to a jury trial. Petitioner, however, overlooks a pertinent provision of F.R.C.P. Rule 38, which provides:

> These rules **shall not** be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Federal Rules of Civil Procedure Rule 9(h) is simply a procedural device whereby the pleader may claim the special

benefits of admiralty procedures and remedies, including a non-jury trial, when the pleadings show that both admiralty and some other jurisdiction exists.

Additionally, the "Jones Act", 46 USC 688, cited at p. Five (5) of the petition, gives the right to elect a jury trial to the injured seaman and not to his Jones Act-employer. This Supreme Court has so found the election to be with the seaman, in *Romero v. International Terminal Operating Co.*, supra.

It has been written that: "It was not the purpose of unification of the Rules to inject a right to a jury trial into those admiralty cases which do not provide for jury trial by statute." Norris. ***The Law of Maritime Personal Injuries. 3rd Ed.*** The Lawyers Co-Operative Publishing Co.; Rochester, N.Y. (1975) p. 418.

For these reasons, petitioner, ROWAN COMPANIES, INC., has no statutory right to a jury trial in the court below.

D. *THE SOLE LIMITATION TO THE WITHDRAWAL OF A RULE 9(h) IDENTIFYING STATEMENT ARE THOSE CONTAINED IN F.R.C.P. RULE 15:*

The pertinent provisions of F.R.C.P. Rule 9(h), cited at p. Five (5) of the petition, provides: "*The amendment of a pleading to* ***add or withdraw*** *an identifying statement is governed by the principles of Rule 15...*". F.R.C.P. Rule 15, reproduced in the petition at p. Six (6), allows amendment with leave of the court. Respondent, LOUIS W. STOREY, was granted leave to add a 9(h) identifying statement, so as to designate his claim as being maritime and to proceed to trial without a jury. It is this granting of leave to amend that so agrieves petitioner.

That a plaintiff can amend to identify a claim as being on the admiralty side of federal court, was correctly upheld in *Doucet v. Whelees Drilling Co.*, 467 F.2d 336 (C.A. 5th Cir. 1972), wherein that Court of Appeal wrote:

> **Plaintiff's choice of the law side was not an irrevocable one**...Under Rule 9(h) the amendment of a pleading to add or withdraw an identifying statement is governed by Rule 15, Federal Rules of Civil Procedure, the Rule governing amended and supplemental pleadings. The Advisory Committee's Note to that Rule says: **"The preferable solution [for providing some device for preserving the present power of the pleader to determine whether historically maritime procedures shall be applicable to his claim or not] is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which the procedural differences will remain, by a simple statement in his pleadings as to the effect that the claim is an admiralty or maritime claim."** id. at *339 et seq.*

It is perhaps due to the axiom that "a seaman is the ward of the federal courts" that such perogatives are given to the complainant. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651 (1938) (for the proposition that seamen are likened to wards of the court).

Other than by asserting that it has a right to a jury trial in the case *sub judice*, petitioner fails to show any prejudice it sustained by the trial judge's granting LOUIS W. STOREY leave to amend his complaint. No other attack is made upon

this discretionary act of the court below. Petitioner's argument, then, is that it simply does not want to "play by the rules", as they exist in the Federal Rules of Civil Procedure, and particularly under Rule 9(h).

E. *THE ORIGINAL COMPLAINT HEREIN SPECIFICALLY DOES NOT ALLEGE JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP:*

Since petitioner agrees that it has no right to a jury trial under the district court's admiralty jurisdiction (Petition p. 15), and since, although the Jones Act presents federal question jurisdiction, the plaintiff can elect to amend his complaint by adding a Rule 9(h) identifying statement and preclude jurisdiction on the law side of the court, petitioner must show some other basis for the trial court's jurisdiction if it is to receive a jury trial.

In *Rachal v. Ingram Corp.*, 795 F.2d 1210 (C.A. 5th Cir. 1986), the Court of Appeal, Fifth Circuit held that its rule in *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (C.A. 5th Cir. 1975), *on rehearing en banc* at 510 F.2d 234 (C.A. 5th Cir. 1975), and *cert. denied* at 423 U.S. 839 (1975), regarding the right to a jury trial under F.R.C.P. 39(a) in a Jones Act claim combined with an unseaworthiness claim, did not apply where the complaint failed to assert diversity of citizenship jurisdiction. As was fully noted within the opinion rendered herein by the Court of Appeal, Fifth Circuit (copied in Petition Appendix A-3 through A-5), nothing in the original complaint establishes diversity of citizenship.

It is axiomatic that a clear and concise statement of the court's jurisdiction must be included within the complaint. F.R.C.P. Rule 8(a)(1) and *Joy v. City of St. Louis*, 201 U.S. 332, 26 S.Ct. 478 (1906). Such a rule is particularly crucial

in maritime cases, where several grounds of jurisdiction might be present but where the plaintiff can elect for his case to be tried on the admiralty side of the court. As stated in Wright & Miller. ***Federal Practice and Procedure***, Vol. 5, sec. 1211, pp. 99-100:

> **If the nonmaritime ground for jurisdiction is being relied upon, the jurisdictional allegation should specify clearly the basis relied upon and plead it in the appropriate manner.** For example, diversity jurisdiction should be pleaded according to Form 2(a)...
>
> ---
>
> ...Thus, the requirements and consequences of Rule 9(h) should be considered carefully when both maritime and nonmaritime grounds for jurisdiction are available in the same suit.

F. *THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT DENY PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAWS:*

For the reasons noted above, detailing why the petitioner DOES NOT have a constitutional right to a trial by jury herein, so also must its cry of denial of due process wither and die. Once again petitioner, ROWAN COMPANIES, INC., can be heard, at pp. 19-20 of its petition, to complain of the rights granted to injured seamen by this Honorable Supreme Court through its decisions and the Federal Rules of Civil Procedure. Put simply, petitioner should seek revision of the Rules and not seek the writs petitioned for herein. The courts below did nothing more than correctly apply F.R.C.P. Rules 9(h), 15, and 38. Yet petitioner does not allege the unconstitutionality of those Rules.

The most peculiar argument of all, however, is petitioner's assertion, at page 20 of its petition, that the impartiality of the entire federal bench is questioned merely because of the clear reading of the Federal Rules of Civil Procedure.

Petitioner's arguments that it has been denied due process and equal protection, therefore, lack any merit whatsoever. The deck is not so strongly stacked in the injured-seaman's favor simply because he has the right to elect between a judge versus a jury trial.

CONCLUSION

The notion of a jury trial in a maritime case is a creature of recent origin. Since admiralty has historically, constitutionally and statutorily been distinguished from the ordinary action at common law for the past several hundred years, the Seventh Amendment to the United States Constitution, expounding the right to a trial by jury in all "common law" suits, is inapplicable to admiralty actions.

Furthermore, there is also no statutory right for the admiralty defendant having a jury trial. General Maritime cases do not fall under the district court's federal question jurisdiction, and the Jones Act, which is a federal question, gives the plantiff the right to elect which procedures will control the course of the claim.

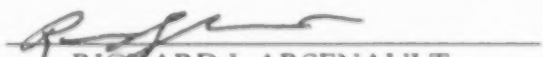
Lastly, a maritime complaint, which may contain several basis for jurisdiction, may contain a Rule 9(h) indentifying statement and thereby be brought on the admiralty side of the federal court without a jury trial. That statement is not etched in stone, and may be added or withdrawn whenever allowed by F.R.C.P. Rule 15. Since a Jones Act defendant has no right to trial by jury, that

defendant is not prejudiced by such a subsequent amendment to the seaman's complaint.

Petitioner, ROWAN COMPANIES, INC., concedes that it is "staring down the barrel" of Fifth Circuit precedent (Petition p. 3), and, therefore, this Honorable Court should "reset the Fifth Circuit's compass" (Petition p. 14). The fifth Circuit precedents complained of are constitutionally, statutorily and jurisprudentially sound. The only compass requiring resetting is Petitioner's; reset to a course consistent with the well established and firmly entrenched principles which have guided those Honorable Courts below.

In conclusion, it is respectfully submitted that the petition for writs of mandamus and certiorari herein be denied, and that the correct decisions below be allowed to stand.

NEBLETT, BEARD & ARSENAULT

BY: 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been served upon all counsel of record by U.S. Mail on this 12th day of December, 1986.


RICHARD J. ARSENAULT